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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE CENTRAL STATES PENSION FUND

Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer defined benefit pension trust fund established in 1955 by affiliates of the International Brotherhood of Teamsters and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947. Central States is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). Central States is administered for the exclusive benefit of the participants to whom the Trustees

owe an undivided duty of loyalty. The purpose of the Central States pension plan is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the plan.

Under the plan participating employers contribute to Central States pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. Employees earn credit (accrued benefits) for covered work periods and after earning 10 years of credit, become vested in the benefits. The plan covers 164,000 retirees currently drawing benefits and 238,000 active participants. During 1993 Central States paid $1.2 billion in pension benefits and $14.1 billion since its creation. Central States presently receives contributions from over 5,000 employers through 9,164 billing accounts from 42 states and Canada.[1]

Additional funding is required by statute when an employer withdraws (ceases to have an obligation to contribute) from Central States. This withdrawal liability is an employer's pro-rata share of the unfunded vested liabilities of the plan. As of June 30, 1994, Central States had 273 outstanding assessments of withdrawal liability totalling approximately $276 million. Since September 26, 1980,[2] Central States has assessed 1,553 withdrawn employers for $1,138 million and has collected about $386 million in withdrawal liability.

In the decision below the United States Court of Appeals for the Seventh Circuit ruled that in calculating and collecting withdrawal liability Petitioner, a multiemployer pension plan like Central States, may not apply an amortization charge (interest) to the first annual billing cycle. *Schlitz v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993), *petition for cert. granted*, No. 93-768 (Jun. 27, 1994). This decision is directly in conflict with an earlier decision of the Third Circuit in *Huber v. Casablanca Industries*, 916 F.2d 85 (3rd Cir. 1990), *cert. dismissed*, —— U.S. ——, 113 S.Ct. 1070 (1993). The Fourth Circuit has also ruled in conflict with the Third Circuit on this question in *Borden v. Bakery & Confectionery Union Pension Fund*, 974 F.2d 528 (4th Cir. 1992). The Fourth and Seventh Circuits are not aligned, however, as we explain *infra*.

[1] A billing account is generally assigned to each collective bargaining agreement. Some employers are subject to more than one agreement.

[2] This is the effective date of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which added the withdrawal liability provisions to the Employee Retirement Income Security Act of 1974 ("ERISA").

This conflict among the circuits creates a problem of immense proportions for multiemployer plans like Central States that cover more than one federal judicial circuit, and have many contributing employers whose broad operations give them a choice of venue. There are three, incompatible ways to calculate withdrawal liability. Put another way, every withdrawal liability assessment is wrong somewhere.

Central States files this brief in support of Petitioner. Central States and Petitioner are both multiemployer plans that, under MPPAA, must collect withdrawal liability. Due to its size, however, Central States brings a somewhat broader perspective to the question presented. To Central States it is more than a question of collecting interest from an employer. The conflict in the circuits impairs the administration of the program and leads to uncertainty and, inevitably, litigation at great cost to the Fund, its participants and beneficiaries, and contributing employers. Central States files this brief to present its view of the statute based on its broader withdrawal liability program and to offer two arguments not presented by Petitioners.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Seventh Circuit ruled below that a multiemployer pension plan may not charge interest on a withdrawn employer's withdrawal liability assessment for the period after the statutory calculation date but before the employer's withdrawal date ("pre-withdrawal interest").[3] The Seventh Circuit misapprehended, however, the nature of this charge. It is not actually an interest charge, but rather is a simple mathematical adjustment to a present value discount calculation.[4] And if the charge is not interest, then the basis for the ruling of the court below is lost and its decision must fall.

The Seventh Circuit also stated (but did not rule) that "[a]n assessment of interest between the date of withdrawal and the date on which payments begin . . . would not be troubling." *Schlitz* at 1004. This is not consistent with the Fourth Circuit, which held that a plan may assess no interest until the first payment is due. We argue first that both circuits are wrong. But if this Court should rule that the Seventh Circuit is correct that pre-withdrawal interest may not be charged, then the Court should further determine whether the Seventh Circuit or the Fourth Circuit is correct on whether a plan may assess interest

[3] Another Court of Appeals, the Fourth Circuit, had earlier ruled that no interest could be charged for the period between the calculation date and the first payment date ("pre-payment interest"). *Borden v. Bakery & Confectionery Pension*, 974 F.2d 528 (4th Cir. 1992). The Third Circuit had ruled that the statute required a one-year interest charge for this period ("first year" or "gap year" interest). *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990). This Court granted certiorari on June 27, 1994 to resolve this conflict. For purposes of this first argument, the Seventh and Fourth Circuit rulings stand or fall together.

[4] The Seventh Circuit followed the parties' convention of referring to this charge as interest (as did the Third and Fourth Circuits in their cases). This shorthand for the mathematical process under the statute may be convenient, but it is not precise, as we show below.

for the post-withdrawal, pre-demand period.[5] As we show, the Seventh Circuit has the better position. If this Court affirms the court below, it should clarify that interest accrues from an employer's date of withdrawal.

ARGUMENT

I. STATUTORY BACKGROUND; EXAMPLE

A withdrawal from a multiemployer pension plan occurs when a contributing employer permanently ceases to have an obligation to contribute or permanently ceases covered operations. 29 U.S.C. § 1383(a). This may occur, for example, because of the expiration of a collective bargaining agreement (under which contributions were owed) or because the company went out of business. When a withdrawal occurs the obligation of the employer to the plan does not necessarily end. If the plan has unfunded vested benefits, then the employer may owe withdrawal liability. 29 U.S.C. § 1381(a). The liability is payable over time (up to 20 years). 29 U.S.C. § 1399(c)(1).[6] The dispute here involves the calculation of a withdrawn employer's withdrawal liability and, in particular, the determination of the beginning balance due under the payment schedule.

It is fair to simplify this process with an example for purposes of this discussion. Say an employer withdraws

[5] For purposes of this alternative argument the Seventh and Fourth Circuit positions stand apart. A failure to resolve the conflict between these positions would leave plans (and employers) guessing as to every withdrawal liability calculation. The split between these circuits is as serious as their split with the Third Circuit and must be resolved for all the reasons stated in the Petition for Certiorari and supporting briefs of *amici* Central States and the United States.

[6] The Court has recently covered this ground in *Concrete Pipe & Products v. Construction Laborers Pension Trust*, —— U.S. ——, 113 S.Ct. 2264 (1994). *See also Connolly v. PBGC*, 475 U.S. 211, 106 S.Ct. 1018 (1986); *PBGC v. R.A. Gray*, 467 U.S. 717, 104 S.Ct. 2709 (1984).

from Central States on July 1, 1994. The employer has been paying Central States a contribution of $50 per week for each of 20 employees under the terms of its collective bargaining agreement and the pension plan. This is a total of $1,000 per week or $52,000 per year for this employer.

To calculate the employer's withdrawal liability, Central States must first know the amount of unfunded vested benefits (UVB) under the plan. This is the difference between the value of assets and the value of vested benefits. 29 U.S.C. § 1393. This amount is determined by Central States' actuary as part of the actuarial valuation that ERISA requires for purposes of a plan's annual report. 29 U.S.C. § 1023(a)(1)(A). Central States' last actuarial valuation shows that as of December 31, 1993, Central States had UVB of $2.195 billion (the difference between assets of $12.332 billion and vested benefit liabilities of $14.527 billion).

The withdrawn employer's share of this UVB is based on the ratio of its own contributions to the contributions of all employers under the plan. In Central States' case this ratio encompasses a ten-year period (*see* 29 U.S.C. § 1391(c)(5)(C)), so in our example the employer's contributions for ten years of $520,000 are divided by total contributions for that period of $6.366 billion—to produce a share of .0082%. Under this calculation the employer's share of UVB would be $180,000.

The next step is to determine the amount of the employer's annual payment. In our example this is easy because we have assumed level contributions. The statutory formula requires that an annual average of contribution base units (weeks worked) be multiplied by the highest contribution rate. 29 U.S.C. § 1399(c)(1)(C). Twenty employees, times 52 weeks worked, times $50 per week, equals $52,000 per year—the same as the pre-withdrawal contribution level.

Finally the statute requires that the plan determine a payment schedule "necessary to amortize the [withdrawal liability] in level annual payments" as if the first payment (here $52,000) were due on the first day of the year following the withdrawal (here January 1, 1995). 29 U.S.C. § 1399(c)(1)(A)(i). This amortization schedule is "based on the assumptions used for the most recent actuarial valuation for the plan." 29 U.S.C. § 1399(c)(1)(A)(ii). The assumption that applies to the calculation is the discount rate, which for Central States is 8%

A final detail is necessary to set up the problem. The first payment is actually due only after the plan issues a demand for payment. This may be earlier or later than January 1, 1995. (The January 1 date is actually only a hypothetical date for purposes of determining a schedule, which is then transferred to the date the first payment is actually demanded). At this point we have taken the process as far as we can with certainty. We do not know how to safely apply this discount rate in determining a payment schedule because the Third, Fourth and Seventh Circuits have each suggested a different method. There is no dispute that interest at the plan's discount rate (here of 8%) must be applied to the payment schedule. 29 U.S.C. §§ 1399(c)(1)(A)(ii) and 1399(c)(6). The dispute is over how to apply this discount rate to the period before the first payment is actually due. The differences among the circuits are as follows.

Third Circuit: Treat the discount rate as an interest rate applicable to the one-year gap between the UVB calculation date and the hypothetical first payment date. Thereafter interest accrues only from the date the actual first payment is due under the schedule of payments (the amortization schedule) demanded by the pension plan.

Fourth Circuit: Apply no interest to the period between the UVB calculation date and the date the actual first payment is due under the schedule of payments demanded by the pension plan. Thereafter interest accrues in accordance with this amortization schedule.

Seventh Circuit: Apply no interest to the period between the UVB calculation date and the date of withdrawal. Apply the interest rate to the period from the date of withdrawal to the date the actual first payment is due under the schedule of payments demanded by the pension plan. Thereafter interest accrues in accordance with this amortization schedule.

The essential difference is the beginning balance on the date the actual first payment is due. The following tables illustrate how the courts of appeals would calculate this balance differently using our example, including Central States' 8% discount rate. Assume that the plan issues its demand for payment in late 1995 with a schedule providing for the first actual payment on January 1, 1996, 18 months after the date of withdrawal.

HOW THE CIRCUITS WOULD CALCULATE THE BEGINNING BALANCE

	Third Circuit	Fourth Circuit	Seventh Circuit
Employer's share of UVB (12/31/93)	$180,000	$180,000	$180,000
Interest to hypothetical first payment on 1/1/95	14,400 [7]	0	7,200 [8]
Additional interest to actual first payment on 1/1/96	0	0	14,400
Beginning balance under payment schedule	194,400	180,000	201,600

From this point it is a simple matter of deducting payments and adding interest until the withdrawal liability is paid in full.

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[7] 8% interest for one year only (gap year interest).

[8] 8% interest per year from date of withdrawal until payments commence (here, ½ year in 1994 and a full year in 1995).

PAYMENT SCHEDULE

	Third Circuit	Fourth Circuit	Seventh Circuit
Beginning Balance	$194,400	$180,000	$201,600
less 1/1/96 Payment	52,000	52,000	52,000
Balance Forward	142,400	128,000	149,600
plus 1/1/97 Interest	11,392	10,240	11,968
less 1/1/97 Payment	52,000	52,000	52,000
Balance Forward	101,792	86,240	109,568
plus 1/1/98 Interest	8,143	6,899	8,765
less 1/1/98 Payment	52,000	52,000	52,000
Balance Forward	57,935	41,139	66,333
plus 1/1/99 Interest	4,635	3,291	5,307
less 1/1/99 Payment	52,000	44,430	52,000
Balance Forward	10,570	0	19,640
plus 1/1/00 Interest	846	0	1,571
1/1/00 Payment	11,416	0	21,211
Balance Forward	0	0	0
TOTAL PAYMENTS	$219,416	$200,430	$229,211

II. SO-CALLED "FIRST-YEAR INTEREST" IS NOT REALLY INTEREST

As the above tables show, the differences among the circuits are found in their determination of the beginning balance to which the payment schedule will apply. There would be no problem if the UVB were calculated as of the date of withdrawal and the first payment were actually due on that date because there would be no gap. But since the UVB is calculated only once annually by the plan's actuary (as of December 31 of each year for Central States), it is not known precisely for withdrawals occurring on any other date. To calculate withdrawal liability, plans must either look back to the last valuation or forward to the next, and Congress has directed that they look back.

In drafting MPPAA Congress grappled with the disparity between dates of withdrawal and valuation dates.

First it considered having the plan wait until the first post-withdrawal valuation:

> (3) The amount of an employer's liability under this paragraph is the product of—
>
> > (A) the plan's unfunded benefit obligations as of the end of the plan year in which the employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from employers withdrawing before such year. . . .

S.1076: Summary and Analysis of Consideration, Committee on Labor and Human Resources, United States Senate at p. 115 (Committee Print, April 1980) (Sec. 104 of the Bill adding a new section 4201(f)(3) to ERISA). In later drafts Congress altered the rule to its present form, requiring the plan to look back to the last valuation date before the date of withdrawal. 29 U.S.C. §§ 1399(c)(3) and 1399(c)(2)(C).[9]

As noted above the actuarial valuation of UVB involves a determination of present values of future assets and liabilities. To determine these present values, plan actuaries use assumptions that must be satisfactory to the Internal Revenue Service. 26 U.S.C. § 412(b)(5). In effect the actuary discounts these future values to an equivalent amount in today's dollars. But if the valuation date is before the employer's date of withdrawal, then the discount has gone too far and has produced a

[9] One of Congress' goals in this legislation was to maintain plan income (and thus solvency) by substituting withdrawal liability payments for the contributions the withdrawn employer had previously made. *See* S. 1076: Summary and Analysis, *supra*, at 20 ("the Committee has balanced the need to protect the plan from interruptions in the flow of contributions"). This could not be achieved without a potentially harmful gap in payments if the plan must wait until the end of the year to calculate withdrawal liability. The change allows for speedier assessment of liability.

value in last year's dollars. If an adjustment is not made, then the employer will pay too little in withdrawal liability to cover its share of the UVB.

The brief of the United States in support of the petition for certiorari made this point well.

> [I]f an employer withdraws from a plan only one year before the last unfunded benefit of $105 comes due, and if the assumed rate of interest under the plan is 5%, the present value of that unfunded liability one year earlier (as of the end of the plan year preceding withdrawal) would be $100. If interest, at the applicable plan rate, is not added back into the calculated deficiency *from the calculation date forward*, the amount paid by the employer a year later (at the presumed first payment date) would not "amortize" the deficiency. In this simple example, the payment required one year after the "calculation date" to make up the deficiency is $105 ($100 plus $5 interest), not $100.

Brief of United States as Amicus Curiae at 18-19 (emphasis in original). While the United States referred to the plan's "rate of interest" and supported adding back the interest to hold the plan whole, it was really dealing with the plan's discount rate. It is not strictly interest that must be added back; it is an adjustment to an excessive discount that must be made. By applying the plan's discount rate, the excess discount is reversed and the UVB calculation can be brought forward to a present value at an appropriate payment date.

The court below was concerned that interest not be applied to a period before the debt even accrued. *Schlitz*, 3 F.3d at 1004. It did not consider the point that the UVB actually had been discounted excessively. When seen as the discount adjustment that it actually is, the additional amount added to reflect time values is not the application of interest to an unaccrued debt that the Seventh Circuit feared and upon which it based its de-

cision. It is simply the final step in the calculation of the debt's beginning principal balance—the withdrawal liability.[10] Since the decision below rests solely on the court's erroneous view of the division between principal and interest, the decision must fall.

This attacks the Seventh Circuit's rationale for striking down "interest," but it does not address whether the language of the statute permits a present value refinement to the UVB in the first place. Since we have shown that the Seventh Circuit's rationale is wrong, we turn now to what the statute does require.

> [A]n employer shall pay [its share of the plan's UVB] over the period of years necessary to amortize the amount in level annual payments . . . calculated as if the first payment were made on the first day of the plan year following [the date of withdrawal]. Actual payment shall commence in accordance with paragraph (2).

29 U.S.C. § 1399(c)(1)(A)(i). In other words Congress specified that a hypothetical payment schedule be derived and then be transferred to an actual payment date. The question is why Congress specified that the hypothetical schedule begin on the first of the year following the withdrawal instead of the first day of the year of the withdrawal (thus coinciding with the valuation date). If Congress had specified the latter, there would be no gap, and it would be entirely clear that no further present value adjustment to the UVB should be made. By separating the hypothetical first payment from the valuation date "as if" the first payment were made on the later date, Congress instructs that an adjustment be made before the schedule is transferred to an actual first payment

[10] See also 29 U.S.C. § 1381(b)(1). Withdrawal liability is defined as the end result of a series of adjustments to the employer's UVB share, including adjustments to the payment schedule. This implies that development of the payment schedule is an interim step in the withdrawal liability calculation. The debt is not "withdrawal liability" until the final adjustment to the UVB is made to create the beginning balance under the schedule.

date. By using the term "amortize" and explaining it further in the next clause, Congress clarifies that the plan's discount rate be applied to make the adjustment. 29 U.S.C. § 1399(c)(1)(A)(ii).[11] Of course, reversing the excess discount is mathematically the same as applying one year of interest at the same rate, so it is understandable that courts and plans have treated it as interest; but in theory it is not.

In sum Congress intended this so-called "first year interest," but it is not really interest after all. Thus there is no undue (or retroactive) interest charge on an unaccrued debt as the Seventh Circuit feared. The court below should be reversed. The plan's payment schedule should be upheld in accordance with the ruling of the district court.

III. IF THE SEVENTH CIRCUIT IS AFFIRMED, INTEREST SHOULD ACCRUE FROM THE DATE OF WITHDRAWAL

The court below ruled that "[n]either the word 'amortize' . . . nor any other language of the statute supports an approach that calls for pre-withdrawal interest." *Schlitz*, 3 F.3d at 1004. "To the extent *Huber* suggests that there are circumstances under which an employer must pay interest for the gap between the December 31 calculation date and the date of actual withdrawal, we disapprove that decision." *Id.* The word "amortize" does, however, mean to apply some interest.

> Amortize: to provide for the gradual extinguishment of (as a mortgage) usu. by contribution to a sinking fund at the time of each periodic interest payment.

[11] The lone numerical example contained in the legislative history of the statute applies a one-year charge to the first payment. H. Rep. No. 96-869, 96th Cong., 2d Sess. 83 (reprinted in 1980 U.S. Code CONG. & ADMIN. NEWS 2918, 2951).

Webster's New Collegiate Dictionary, G. & C. Merriam Company (1976). The Seventh Circuit recognized this in disapproviing only pre-withdrawal interest. "An assessment of interest between the date of withdrawal and the date on which payments begin, in order to make the amortization schedule actuarially correct, would not be troubling." *Schlitz*, 3 F.3d at 1004.

The Fourth Circuit, by contrast, disapproved any interest accruing before the first payment date. *Borden*, 974 F.2d at 536 ("MPPAA is silent on the issue of imposing interest during the year in which the employer withdraws."). The Fourth Circuit did not even acknowledge Congress' use of the terms "amortize" (other than to quote the passage), much less analyze it.

As we show in Section II, *supra*, the "gap year" charge is not really interest but may be treated as such mathematically to achieve a proper present value of the UVB. Congress confirmed this with the word "amortize" used in conjunction with the deferred hypothetical first payment date. If this Court accepts, however, the Seventh Circuit's view that this charge is truly interest on a newly arisen debt, then it might reasonably conclude that no interest should apply to a period before the debt existed, as the Seventh Circuit held.[12] But then the Court should also accept the Seventh Circut view that by the term amortize Congress meant plans to apply interest to the debt, even to the gap year, as long as it applies only to the period after the debt arises (on the date of withdrawal). The Fourth Circuit did not address the statutory language, other than to erroneously state that the statute was silent; so its reasoning is flawed and its conclusion is wrong. Thus if the Seventh Circuit is affirmed at all, the Fourth

[12] The withdrawal liability debt is, of course, actually just a specific allocation of a more general UVB debt shared by all plan contributors; thus it is not an entirely new debt, and pre-withdrawal interest is appropriate. See brief of *amicus curiae* National Coordinating Committee for Multiemployer Plans.

Circuit should still be disapproved, and interest should be allowed to run from the date of withdrawal.

CONCLUSION

This Court should reverse the court below and order the reinstatement of the judgment of the district court (thus approving the Third Circuit's decision in *Casablanca* and disapproving the Fourth Circuit's decision in *Borden*). Alternatively this Court should affirm the court below that interest runs from the date of withdrawal (thus approving the Third Circuit's decision in *Casablanca*, in part, and disapproving the Fourth Circuit's decision in *Borden* in its entirety).

Respectfully submitted,

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